

Significantly, for purposes of this letter, the Commission also determined that rate changes accompanying changes in programming subject to regulation would not be subject to negative option billing requirements:

We also observe that if we subjected relatively minor tier changes to the scope of the provision, subscribers might well perceive the need to resubscribe each time such a change occurred as a burden, rather than a benefit. Moreover, any actual or implicit change in price accompanying programming changes would be subject to our rate regulations -- to basic rate review at the local level and to review of cable programming service complaints at the FCC. We do not believe it necessary . . . also to subject any service changes accompanied by a price increase to negative option billing requirements. We note that our customer service rules require operators to give subscribers 30-days advance notice of any changes in rates, programming or channel positions. We do not believe subscribers also need the additional protection of the negative option billing provision for every proposed rate increase, unless a price change accompanies a fundamental change in service, such as the addition of a tier.⁴

Finally, the Commission concluded:

restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment. As NCTA suggests, a subscriber presumably has already "affirmatively requested" this level of service. However, as with other changes in the mix of programming services, restructuring will be subject to the negative option billing provision, if the restructuring effects a fundamental change in the nature of the service subscribers receive. We agree with Time Warner that retiering accompanied

⁴ Id. at 5906-07 (footnote omitted; emphasis added).

by a price increase is likely to be subject to rate regulation scrutiny.⁵

It thus seems clear that, as a matter of federal law, rate increases resulting from the FCC-approved passing through of external costs or inflation adjustments as well as rate channel changes resulting from the addition or deletion of programming to a regulated tier would not run afoul of the negative option billing prohibitions; and an operator need not receive an affirmative request from subscribers to institute such changes.

A question arises, however, over whether state and local authorities may enforce their negative option billing laws against these same practices. We think it clear that since the proposed situations at issue plainly implicate rate regulation and clearly are not violative of federal negative option billing requirements, state and local authorities are pre-empted from enforcing their laws in a manner inconsistent with the federal determinations.

In the Third Order on Reconsideration the Commission concluded:

[W]e believe that the 1992 Cable Act generally does not preempt state and local governments from regulating negative option billing practices of cable operators under state or local consumer protection law. We note, however, that Section 3(a) of the 1992 Cable Act provides that states and franchising authorities may regulate "the rates for the provision of cable service" only to the extent provided by the statute in accordance with rules established by the Commission. As explained above, we believe that in typical circumstances regulation of negative option billing does not implicate "rates for the provision of cable service," but rather simply addresses billing practices of cable operators, activity which seems more in the nature of consumer protection than rate regulation. Therefore, we conclude that Section 3(a) of the 1992 Cable Act generally does not "specifically preempt" state and local governments from enacting and enforcing state or local consumer protection laws that may address negative option billing practices of cable

⁵ Id. at 5907-08 (footnotes omitted). The Commission also concluded that rate increases accompanying equipment changes are not within the scope of the negative option billing provision since, inter alia, the rate regulation provisions would apply to such increases. Id. at 5908.

operators. Should we become aware of a particular situation, (e.g., through petition for declaratory ruling), in which state or local regulation of negative option billing goes beyond consumer protection and instead approaches actual regulation of "rates for the provision of cable service," or otherwise goes beyond consumer protection law, we will consider the question of federal preemption in that specific factual context.⁶

The rate increases and programming changes which are the subject of this letter plainly implicate rates for the provision of regulated services as opposed to the marketing or billing of those services. For this reason, as noted above, the Commission has effectively concluded that such rate increases or programming changes are not subject to the federal negative option billing prohibitions. For like reasons, the Commission should pre-empt state and local regulation of such practices.

The practical consequences of permitting the myriad of state and local authorities to construe permitted rate increases or channel changes to be negative options would be far-reaching. Under such a scenario a cable operator would be effectively precluded from achieving the return permitted by the FCC (i.e., the rate increases permitted by the price cap and "going forward" regimes) without first seeking the affirmative assent of each of its subscribers. More significantly, under the relevant state or local law, each subscriber who did not affirmatively "request" the "service" would have its service discontinued -- and most subscribers would not even realize the reason for such a cut-off. As the Commission itself suggested, requiring the resubscription of each subscriber with every permitted rate increase or channel change would be perceived as a burden on, not a benefit to, those subscribers. Surely the Commission did not intend to permit state and local "concurrent jurisdiction" over negative option billing to operate in this manner.

For this reason, we ask the Commission to clarify that when rates are raised on existing tiers as a result of an FCC-permitted inflation adjustment or external cost pass-through or when an operator's regulated channel complement is changed pursuant to the FCC's "going-forward" methodology or when a new program channel is substituted for a pre-existing channel on a regulated tier, those actions will not be considered "negative options". Accordingly, the operator need not affirmatively market those "service changes" by name nor may state or local authorities regulate such changes regardless of how the local requirement is characterized.

⁶ Third Order on Reconsideration at ¶ 131 (emphasis added).

William E. Kennard, Esquire
April 26, 1994
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Because this question is of widescale applicability to cable operators and programmers, and does not depend on the facts of a particular franchising situation, we urge you to promptly clarify the applicability of the FCC's negative option billing rules to these circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel L. Brenner". The signature is fluid and cursive, with the first name "Daniel" being more prominent than the last name "Brenner".

Daniel L. Brenner

cc: Blair Levin
Merrill Spiegel
Maureen O'Connell
Byron Marchant
Lisa Smith
James Coltharp
Kathy Wallman
Alexandra Wilson

DLB:ldh

ATTACHMENT B

National Cable Television Association

Daniel J. Blenner
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January 24, 1994

Delivered by Hand

Ms. Alexandra Wilson
Acting Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918A
Washington, D.C. 20554

Dear Sandy:

The Commission's letters of inquiry have sought information on, among other things, whether individual a la carte program offerings constitute a "realistic service choice" for cable subscribers. As part of that inquiry, the Commission has requested that individual cable operators provide information on the level of discount available to subscribers when they purchase a package of a la carte services compared to the sum of the cost for purchasing each channel on an individual basis.

In approaching this issue, we would hope the Commission continues to recognize the benefits of discount packaging. As the Commission in its Rate Report and Order recognized, "[c]able operators should be free to offer collective offerings at a combined price which is less than the sum of the charges for the individual services. Such discounts benefit the customer by making premium channels more affordable and thus more widely available." (Report and Order at ¶ 327).

The offering of discounts when items are purchased as a package is a common marketing practice. Many cable operators have used this marketing concept for years with respect to their "premium" service offerings. While the level of discount for such packages varies widely, discounts can range up to in excess of 50 percent as compared to the purchase of each channel individually. (See attached chart)

The offering of substantial discount packages of a la carte services is also common in the market for programming sales to home satellite dish owners. As an example, Superstar Connection, one of the market leaders in providing service to home dish viewers, offers packages of a la carte offerings with discounts that can range from 14 percent to 56 percent (see attached chart).

In short, substantial discount program packages have long been offered, and continue to be offered, for business reasons that have no connection to the regulatory process. The Commission should continue to recognize the legitimacy of this marketing practice, the degree

Ms. Alexandra Wilson

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of discounting accompanying this practice and not unfairly hamper cable operators' ability to continue to provide their subscribers with this same cost savings in connection with their sale of a la carte channels.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Brenner", with a stylized, flowing script.

Daniel L. Brenner

DLB:tkb

Enclosures

cc: Maureen O'Connell, Esq.
Merrill Spiegel, Esq.
Lisa Smith, Esq.

Selected Comparisons of Prices of Multi-Pay Services Offered in Packages and *a la Carte*

Company/Package/Programming	Package Price ¹	Price if Programming Purchased <i>a la Carte</i>	Percentage Difference
Time Warner Cable Cablevision of Raleigh Standard Plus (4 Pay Package)	\$21.65	\$44.00	51%
Cable TV Arlington GreatValue One (HBO, TMC, Encore)	\$14.00	\$30.93	55%

Source: Rate cards of Time Warner Cable/Cablevision of Raleigh and Cable TV Arlington

Selected Comparisons of Prices of Programming Services Offered in Packages and *a la Carte* by Superstar Connection

Package/Programming	Package Price ¹	Price if Programming Purchased <i>a la Carte</i> ²	Percentage Difference
SuperView WGN/WPIX/KTLA/KTVT WTBS/USA Network/CNBC/ESPN CNN/Headline News/AMC/Bravo/Family Channel/ Prime Network/Discovery/Lifetime/A&E/Country Music Television/TNN Weather Channel/Cartoon Network/ Comedy Central/ESPN2	\$17.95	\$40.50	56%
SuperView plus HBO or Cinemax, or Showtime or TMC	\$23.00	\$49.50	54%
SuperView plus PrimeTime 24	\$20.95	\$45.50	54%
Sports Pack (WGN/WPIX/KTLA/KTVT/WTBS/WWOR/ WSBK/Satellite Sports Network/ESPN/ ESPN2) Plus Denver 5	\$22.00	\$26.75	18%
Sports Pack Plus Denver 5 and PrimeTime 24	\$25.25	\$31.75	20%
SuperSelect WGN/WPIX/KTLA/KTVT/WTBS/Discovery/ Family Channel/USA Network/CNN/ Headline News/TNN/CMT/Weather Channel/Prime Time 24	\$12.50	\$27.00	54%
Superstar "Magnificent" 7 Pack WGN/WPIX/KTLA/KTVT WTBS/WWOR/ WSBK	\$7.70	\$9.00	14%

1) Monthly retail price.

2) Full, *a la carte* monthly retail prices. Some discounts from the full *a la carte* price may be applicable if a certain number of services are purchased, if some programming services are bought in combinations, or if services are bought on other than a monthly basis.

Source: Rate cards of Superstar Connection, dated 12/29/93.